90-37

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

JULIAN MALCOMSON, PETITIONER

V.

THE UNITED STATES
OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RONALD O. HOLMAN
5949 Sherry Lane, Suite 1135
Dallas, Texas 75225
(214) 361-9494

COUNSEL FOR PETITIONER,
JULIAN MALCOMSON

MAY 25, 1990

QUESTION PRESENTED

Whether the U.S. District Court erred in denying the Motion for Costs filed by Julian Malcomson requesting that the government reimburse him for his travel expenses to Dallas so he might consult in person with his Court appointed counsel prior to trial (due to the voluminous amount of documentary evidence which was to be presented by the Government at trial) on the ground that Malcomson was thereby denied his Constitutional guarantee of the assistance of counsel for his defense?

PARTIES TO THE PROCEEDINGS
IN THE COURT OF APPEALS FOR
THE FIFTH CIRCUIT
CAUSE NO. 88-1327

JAMES G. BRYAN
ATTORNEY, JOSEPH A. HOFFMAN

EUGNE R. JACKSON
ATTORNEY, JOHN DEE EVANS

JOHN WORLEY
ATTORNEY, DAVID M. PRUESSNER

JAMES A. HEARN
ATTORNEY, BENNETT A. MIDLO

JULIAN MALCOMSON
ATTORNEY, RONALD O. HOLMAN

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

NO. _____

JULIAN MALCOMSON, PETITIONER

V.

THE UNITED STATES
OF AMERICA, RESPONDENT

PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JULIAN MALCOMSON, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 22, 1990.

OPINIONS BELOW

The February 22, 1990 opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is reprinted in the Appendix to this petition, at page A-21.

The prior verdict of the United States District Court for The Northern District of Texas -Dallas Division, is reprinted in the Appendix to this petition, at page A-5.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on February 22, 1990 (Appendix, at page A-21). A timely Petition for Rehearing (Appendix, at page A-45) was denied on March 26, 1990 (Appendix, at page A-50). The jurisdiction of the Supreme Court is invoked under U.S. Const. Art. 3 § 2 cl.2 and 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The case involves the Sixth Amendment to the Constitution of the United States, which states as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

In January, 1981, James G. Bryan created a company in the Cayman Islands called United States Tax Planning Service (USTPS). Bryan and other persons conducted seminars on behalf of USTPS on topics including tax shelters, commodities straddles, the use of foreign tax havens and the use of foreign corporations. USTPS promoted and sold tax shelters to interested clients and used these seminars to generate clients. USTPS franchised or licensed its offices to licensees throughout the United States. Julian Malcomson (hereinafter "Malcomson") was an accountant and licensee of USTPS.

On April 30, 1987, Malcomson was named on one count of conspiracy to defraud the United States in a twenty-five count indictment filed

in Dallas, Texas. Malcomson and twenty-one other individuals were named in the indictment and Malcomson was only charged with a violation of 18 U.S.C. Section 371.

THE EVIDENCE

Malcomson was found to be indigent and was living in California at the time he was indicted in Dallas. His Court appointed counsel for trial was Mr. Cornell Walker, an attorney practicing in Dallas, Texas. Malcomson filed a Motion for Costs on August 20, 1987, (Appendix, at page A-1) to order the government to reimburse him for travel expenses to Dallas so that he might consult with his court appointed counsel in person and review the great mass of complex documents which were to be presented by the government at the trial of this matter.

THE RULINGS BELOW

The U.S. District Court denied Malcomson's Motion for Costs stating that Malcomson could

"effectively communicate with his attorney through telecommunication or through the United States Postal Service" (Appendix, at page A-5). As a result of the Court's ruling, Malcomson was denied the assistance of counsel for his defense because his counsel was essentially barred by the U.S. District Court from adequately or completely preparing Malcomson's case for trial.

On January 19, 1988, the Trial involving Malcomson and Defendants Bryan, Hearn, Jackson and Worley commenced. On March 7, 1988, a verdict of guilty was entered against Malcomson on the only count on which he was tried (Appendix, at page A-7). On June 16, 1988, judgment was rendered and Malcomson was given a suspended sentence, fined the sum of $6,050.00 and placed on five years probation (Appendix, at page A-16).

The Court of Appeals for the Fifth circuit substantially agreed with the U.S. District Court by upholding the guilty verdict against Malcomson and the other defendants; however, one

conspiracy charge was reversed and dismissed on the grounds of double jeopardy against another defendant, James Bryan (Appendix, at page A-21). The judgment of the Court of Appeals does not address Malcomson's claim that he was denied the effective assistance of counsel. The Court of Appeals therefore overlooks a point of law that is unique to Malcomson's case.

Malcomson filed a Petition for Rehearing advising the Court of Appeals of its failure to address this unique issue (Appendix, at page A-45), but the Petition for Rehearing was denied (Appendix, at page A-50).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with prior decisions of this Court and other Courts of Appeal.

The Sixth Amendment to the United States Constitution entitles the accused in a criminal

proceeding to representation by an attorney reasonably likely to render reasonably effective assistance. See, e.g., Hill v. Wainwright, 617 F.2d 375 (5th Cir. 1980); Carbo v. United States, 581 F.2d 91 (5th Cir. 1978). When a defendant is given ineffective assistance of counsel, the Defendant's conviction must be overturned. Cooks v. United States, 461 F.2d 530 (5th Cir. 1972). The failure to conduct reasonable pretrial investigation may itself amount to ineffective assistance of counsel. McQueen v. Swenson, 498 F.2d 207, 217-18 (8th Cir. 1974). Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979).

Adequate consultation between attorney and client is an "essential element of competent representation of a criminal defendant". Coles v. Peyton, 389 F.2d 224, 225-26 (4th Cir. 1968), cert. denied, 393 U.S. 849, 89 S. ct. 80, 21 L. Ed. 2d 120 (1968). The American Bar Association Standards for Criminal Justice are in accord, providing, in relevant part, that "as soon as

practicable, the lawyer should seek to determine all relevant facts known to the accused." (At Section 4-3.2, Interviewing the Client.) It is only logical that the relevant facts be determined by counsel during pre-trial discovery and investigation. Despite a diligent attempt to obtain government assistance to finance essential and meaningful pretrial consultation with his court appointed counsel, Malcomson never meet with his attorney in person until immediately prior to the commencement of the trial. Thus, Mr. Walker (the court appointed counsel) never had the opportunity to personally examine and cross-examine his own client to evaluate his veracity, credibility, appearance and integrity in order to reach the critical decision of whether to call Malcomson as a witness to testify in his own behalf at trial.

Given the extreme complexity of the government's case against Malcomson, the necessity for extensive "in person" pre-trial consultation between Malcomson and his trial

attorney is obvious. Clearly, Malcomson's defense was prejudiced by the lack of any pre-trial meetings with his attorney. The government tendered thousands of pages of documents during the course of discovery in this case and introduced hundreds of documents into evidence at trial. Many of these documents contained complicated tax materials. Malcomson, as an indigent defendant, never had the opportunity to see most of these documents before trial or to review and discuss them with his counsel precisely because the Motion for Costs was denied. Malcomson did not have the money to pay his own way to come to Dallas.

While Malcomson's court appointed trial attorney had no experience with tax matters, Malcomson possessed tax knowledge by virtue of his position as an accountant. Malcomson was familiar with some of the documents in question as a number of them pertained to transactions in which he had personal knowledge. A number of Malcomson's own documents had been procured by

the government investigators. However, there was a large number of documents introduced into evidence by the government at trial which Malcomson had never previously seen. Malcomson's identification of and familiarity with the documents seized by the government as well as his tax knowledge should have been explored with his attorney before trial. Moreover, Malcomson would have provided insight to his attorney regarding the accuracy and veracity of the documents which were the basis of the Government's case against him. However, the Court's denial of the Motion for Costs effectively prohibited this stage of the pre-trial discovery process.

Given these facts, a pre-trial meeting between Malcomson and his court appointed attorney was an absolute necessity. During the entire pendency of the case, Malcomson had only nominal telephone and letter contact with his attorney. Virtually none of the government's massive documentary evidence was reviewed and

discussed by Malcomson with his attorney. Malcomson's plea for court assistance to bridge this communication gap was denied. As a result, any advice or clarification Malcomson might have been able to offer to his attorney as to the possible use of the government's documentary evidence for his own defense was forever lost.

Malcomson's court appointed trial counsel obviously had no personal knowledge of the events surrounding the preparation, execution and use of the documents seized by the government. He could not conduct a prudent and effective pre-trial investigation on his own. It is difficult to understand how Mr. Walker could make an informed assessment of the strengths and weaknesses of the government's case against Malcomson without a competent review of the government's documents in person with his client. Mr. Walker's ability to develop trial strategy with his client and to attack the government's documentary evidence was seriously compromised once he was unable to

review these documents in person with his client before trial. Given the circumstances of the government's case, the denial of Malcomson's Motion for Costs clearly prevented him from receiving the effective assistance of counsel as guaranteed by our Constitution.

"The most able and competent lawyer in the world cannot render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense." McQueen v. Swenson, 498 F.2d 207, 217 (8th Cir. 1974). Even "brilliant eloquence in the Courtroom cannot negate incomplete preparation." Rock v. Zimmerman, 586 F. Supp. 1076, 1079 (M.D. Penn. 1984). It can hardly be said that Mr. Walker's preparation of Malcomson's defense was adequate or complete when the Trial Court prevented him from exploring and fully exploiting an important avenue of defense - a thorough examination of

the government's documentary evidence in person with his client. Moreover, Mr. Walker was denied the opportunity to personally evaluate his client as a potential witness at trial. As a result, Malcomson's court appointed attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment.

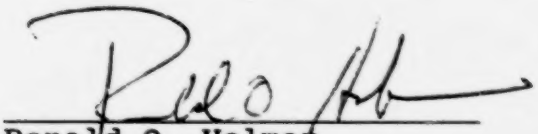
Malcomson was clearly prejudiced by the Trial Court's ruling because his court appointed counsel's trial preparation was inadequate and incomplete. Though Mr. Walker did the best he could, Malcomson's ship had been clearly sunk before it ever left the harbor by virtue of the U.S. District Court's denial of his Motion for Costs. This action resulted in Malcomson being denied his Sixth Amendment right to the assistance of counsel for his defense.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted. In the event that the writ is granted, Petitioner prays

that this Honorable Court dismiss the indictment against him and overturn his criminal conviction or, alternatively, grant him a new trial.

Respectfully submitted,



Ronald O. Holman

5949 Sherry Lane, Suite 1135
Dallas, Texas 75225
(214/361-9494)

ADMITTED TO PRACTICE BEFORE THE UNITED STATES SUPREME COURT ON MAY 21, 1990.

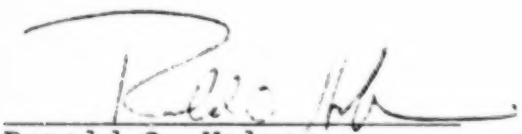
ATTORNEY FOR PETITIONER, JULIAN MALCOMSON

PROOF OF SERVICE

This is to certify that three copies of the above and foregoing Petition for a Writ of Certiorari to the United States Supreme Court have been sent by certified mail, return receipt requested to the following counsel of record on this 27th day of June, 1990.

Karen Quesnel
Appellate Section
U.S. Department of Justice
Tax Division
9th & Pennsylvania
Avenue, N.W.
Room 4623
Washington, DC 10530

Solicitor General
Department of Justice
Washington, D.C. 20530



Ronald O. Holman

APPENDIX

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(9006081w.d4)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	X	
	X	
VS.	X	
	X	
JAMES G. BRYAN	X	
ROBERT J. (JACK) BRYAN	X	
RAUL COSTALES	X	
JAMES R. CURTIN	X	
ALLAN L. DOLAN	X	
LYNFORD R. EVANS	X	
MITCHELL E. EXCTAIN	X	
ELMER M. HASKINS	X	
WAYNE M. HASKINS	X	CRIMINAL NO.
JAMES A. HEARN	X	CR3-87-116-T
EUGENE R. JACKSON	X	
JULIAN MALCOMSON	X	
RICHARD W. MORRIS	X	
MICHAEL K. MULFORD	X	
JAN T. SHELTON	X	
MICHAEL K. SHELTON	X	
GEORGE SPRAGUE	X	
JUDITH THOMASON (CURTIN)	X	
ANTHONY VIRTUE	X	
ANDREAS WIEDENFELD	X	
RONALD F. WILLIAMS	X	
JOHN WORLEY	X	

MOTION FOR COSTS

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes, Julian Malcomson, hereinafter referred to as Defendant Malcomson and files

this his Motion for Costs and in support of said Motion would show unto the Court the following:

1.

Court appointed Attorney Hollye C. Fisk, (hereinafter referred to as Attorney) is licensed to practice and practices in the State of Texas with his office being located in Dallas, Dallas County, Texas. Defendant Malcomson is a resident of Bakersfield, California and is indigent pursuant to the matters previously determined by this Court and appointing Attorney to represent Defendant Malcomson. Defendant Malcomson does not have sufficient funds to travel to Texas in order to consult with Attorney and to date all consultations have been over the phone. Such conversations do not allow Attorney to meet his client nor do such conversations allow Attorney and Defendant Malcomson to adequately and completely discuss the case nor review the

materials which have been obtained on discovery or to adequately discuss and prepare for trial.

2.

Defendant Malcomson prays that this Honorable Court enter its Order reimbursing Defendant Malcomson for his expenses, including but not limited to: airfare, car, hotel accommodations and food for at least two round trips prior to trial between California and Dallas, Dallas County, Texas. The granting of said Motion would only insure that justice be done in this case.

WHEREFORE, PREMISES CONSIDERED, Defendant Malcomson prays that this Honorable Court grant this his Motion for Costs.

Respectfully submitted,

GREENBERG, FISK, BUSH & WALKER

/s/

Hollye C. Fisk
State Bar of Texas #07070500
2710 Stemmons Freeway
4th Floor, North Tower
Dallas, Texas 75207 688-4433&

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 1987, a true and correct copy of the foregoing Motion for Costs was mailed to all counsel of record.

/s/

Hollye C. Fisk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA

V.

JULIAN MALCOMSON

ORDER DENYING MOTION FOR REHEARING

On November 5, 1987, Defendant Julian Malcomson filed his Motion for Rehearing. On December 1, 1987, Defendant filed his Supplement to Motion for Rehearing.

Defendant asks the Court to set this motion for hearing and reconsider the Magistrate's denial of his Motion for Costs. Defendant, who lives in California, asked the Court to order the government to reimburse Defendant for his travel expenses to Dallas so he may consult with his court-appointed attorney in person. This Court is of the opinion that Defendant's motion

should be denied and that the Magistrate's ruling should be affirmed.

Even if the indigence of Defendant is undisputed, the Court sees no deprivation of his right to effective counsel. The Defendant can effectively communicate with his attorney through telecommunication or the United States Postal Service.

It is therefore ORDERED that Defendant's Motion for Rehearing is denied and the ruling of the Magistrate is affirmed.

Signed this 16th day of December, 1987.

/S/

ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITES STATES OF AMERICA,

v. CR 3-87-116-T

JAMES G. BRYAN
JAMES A. HEARN
EUGENE R. JACKSON
JULIAN MALCOMSON
JOHN WORLEY

VERDICT OF THE JURY

Count 1:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, EUGENE R. JACKSON:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JULIAN MALCOMSON:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JOHN WORLEY:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 2:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 3:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 4:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, EUGENE R. JACKSON:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 5:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, EUGENE R. JACKSON:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 6:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, EUGENE R. JACKSON:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 7:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, EUGENE R. JACKSON:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 8:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JOHN WORLEY:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 9:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 10:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 11:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 12:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 13:

We, the Jury, find the Defendant, JAMES A. HEARN:

___Guilty_____ of the offense charged.
"Guilty" or "Not Guilty"

Count 14:

We, the Jury, find the Defendant, JAMES G. BRYAN:

___Guilty_____ of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

___Guilty_____ of the offense charged.
"Guilty" or "Not Guilty"

Count 15:

We, the Jury, find the Defendant, EUGENE R. JACKSON:

___Guilty_____ of the offense charged.
"Guilty" or "Not Guilty"

Count 16:

We, the Jury, find the Defendant, JAMES G. BRYAN:

___Guilty_____ of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 17:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 18:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 19:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, EUGENE R. JACKSON:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 21:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 22:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 23:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 24:

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

Count 25:

We, the Jury, find the Defendant, JAMES G. BRYAN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

We, the Jury, find the Defendant, JAMES A. HEARN:

Guilty of the offense charged.
"Guilty" or "Not Guilty"

SIGNED this 7th day of March, 1988.

/s/
PRESIDING JUROR

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

V.

JUDGEMENT IN A CRIMINAL CASE

JULIAN MALCOMSON
8405 B Olympia Drive
Bakersfield, CA 93309

Case Number:
CR3-87-116-T

(Name and Address of Defendant)

Cornell Walker
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

(__ guilty __ nolo contendere) as to count(s) _____, and
_X_ not guilty as to count(s) one (1).

THERE WAS A:
(__finding __verdict) of not guilty as to count(s)_____.
__judgement of acquittal as to count(s) _____
_____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

18 USC 371	Conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful function of the IRS and the Department of Treasury of the U.S.	Ct. 1

(offense committed on or about January 1981 to end of 1985)

IT IS THE JUDGMENT OF THIS COURT THAT:

Imposition of the sentence of imprisonment is suspended and the defendant is placed on probation for a period of five (5) years with the special condition that he perform 200 hours of community service as directed by the U. S. Probation Office.

IT IS FURTHER ORDERED that the defendant pay Cost of Prosecution in the amount of $6,000.00.

IT IS ORDERED pursuant to Title 18, United States Code, Section 3013(a), defendant is required to pay a special assessment in the amount of $50.00.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

==========

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability (when out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) one (1) as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

__ The Court orders commitment to the custody of the Attorney General and recommends:

June 16, 1988
Date of Imposition of Sentence

/S/
Signature of Judicial Officer

ROBERT B. MALONEY, United States District Judge
Name and Title of Judicial Officer

June 16, 1988
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
(date)

_____ at _____
General, with a certified copy

_____, the
of this Judgment in a Criminal Case
institution designated by the Attorney.

_____
United States Marshall

By_____
Deputy Marshall

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-1327

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES G. BRYAN, JAMES A. HEARN,
EUGENE R. JACKSON, JOHN WORLEY,
AND JULIAN MALCOMSON,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(February 22, 1990)

Before GOLDBERG, POLITZ, and JONES, Circuit Judges. POLITZ, Circuit Judge:

James G. Bryan, James A. Hearn, Eugene R. Jackson, Julian Malcomson, and John Worley challenge their convictions for various violations involving the promotion and sale of fraudulent tax shelter schemes. With the exception of the double jeopardy challenge made by Bryan to the conspiracy count, we affirm. We

remand Bryan's double jeopardy challenge for entry of an order of dismissal as discussed herein.

Background

A grand jury for the Northern District of Texas returned an indictment in April 1987 charging 22 defendants, including the five appellants, with illegal activities resulting from their involvement in the promotion and sale of fraudulent tax shelters. All defendants were charged with conspiring to defraud the government by impeding the lawful operation of the Treasury Department, 18 U.S.C. § 371. All defendants except Malcomson were charged with various counts of willfully aiding and assisting in the preparation or presentation of false tax returns, 26 U.S.C. § 7206(2). Appellants were tried to a jury which returned verdicts of guilty on all counts against all defendants.

The indictment charges that in 1981 Bryan formed the United States Tax Planning Service

(USTPS) and devised a variety of tax shelters which, in effect, crossed the line separating tax avoidance from tax evasion. The tax schemes were marketed at seminars and were sold by USTPS offices and licensees throughout the nation. The schemes were based on the creation of false income tax deductions through the fraudulent: (1) contributions to the Congregational Church of Human Mortality; (2) purchases of malpractice and other insurance from the Professional Liability Insurance Corporation; and (3) use of commodities straddles. The program involved channeling the transactions through a tax-friendly country, usually the Cayman Islands, the creation of a false paper trail of invoices and receipts, and the return to the client-taxpayer of the sums involved, less the fees paid to USTPS.

At various times and in various capacities, Hearn, Jackson, Malcomson, and Worley joined in the development, promotion, and sale of the

schemes. Hearn, an accountant, operated the Dallas USTPS office, later known as Worldwide Capital Management (WCM). Worley, an attorney, worked at the Dallas office. Jackson was a broker with Conti-Commodities Services, Inc. and had significant contact with the Dallas office. Malcomson operated the USTPS franchise in St. Paul, Minnesota.

Analysis

I. Double Jeopardy

Appellants raise multiple issues on appeal. We first address the one issue which merits a reversal, Bryan's plea of double jeopardy.

In March 1985 a grand jury for the District of Oregon handed up a 51-count indictment charging Bryan and three others with, inter alia, conspiracy to defraud the United States by impairing and impeding the lawful functions of the Treasury Department, 18 U.S.C. § 371. Bryan was convicted on all counts. In January 1989 the Ninth Circuit Court of Appeals vacated

Bryan's convictions and remanded the case for a determination whether he improperly was denied access to certain documents. United States v. Bryan, 868 F.2d 1032 (9th Cir.), cert. denied, _____ U.S. _____, 110 S.Ct. 167 (1989).

The instant indictment charges Bryan and 21 other defendants with, inter alia, conspiracy to defraud the United States by impairing and impeding the lawful functions of the Treasury Department, 18 U.S.C. § 371. Both indictments also charge tax fraud in violation of 26 U.S.C. § 7206(2); the Oregon indictment has 28 counts of tax fraud, the Texas indictment contains 24 such counts.

The Oregon indictment covers the period from the mid-1970s until December 31, 1984; the Texas indictment charges a conspiracy from the beginning of 1981 until the end of 1985.

Bryan moved for dismissal of the present conspiracy count, urging that the double jeopardy clause of the fifth amendment prevents

his retrial on the conspiracy count. The district court denied his motion but severed Bryan's trial on the conspiracy count and stayed that action pending the appeal. We consolidated Bryan's appeal from the ruling on the double jeopardy motion with his appeal on the merits.

Whether the constitutional prohibition against twice placing a person in jeopardy bars the instant conspiracy indictment is determined by deciding whether the two indictments charge separate and distinct conspiracies, or two parts of the same conspiracy. We have developed guidelines and procedures to assist us in that determination. In United States v. Stricklin, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963 (1979), we held that once a defendant established a prima facie non-frivolous double jeopardy claim the burden shifts to the government to demonstrate by a preponderance of the evidence that the indictment charges a crime separate from that for which the defendant

previously was placed in jeopardy. The district court found that Bryan made the requisite showing, but concluded that the government had established by a preponderance of the evidence that he was involved in two separate conspiracies to defraud the United States with his tax schemes.

The essential issue in a double jeopardy analysis involving conspiracy is whether one, or more than one, agreement existed, United States v. Levy, 803 F.2d 1390 (5th Cir. 1986). The Supreme Court has long recognized that multiple conspiracies require multiple agreements. Braverman v. United States, 317 U.S. 49 (1942). In United States v. Marable, 578 F.2d 151, 154 (5th Cir. 1978), we enumerated five factors to be considered in the single/multiple agreement analysis:

(1) the time-frames of the charged conspiracies;
(2) the persons acting as conspirators;
(3) the statutory offenses charged in the indictments;

(4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and the scope of the activity which the government sought to punish in each case; and
(5) places where the events alleged as part of the conspiracy took place.

Viewing the facts of record in light of the Marable factors we are persuaded that Bryan was involved in one continuous conspiracy. An examination of the time factor reveals a significant overlap of four years. The cast of characters changes but Bryan remains the central and essential figure in both indictments. The Oregon indictment named Bryan and three others. Two of those are joined with Bryan and 19 others in the subsequent Texas indictment. The government leans heavily on the 19 other defendants indicted in Texas to establish a sufficient dissimilarity. The government attempts to shift the focus of our inquiry from an exploration of the nature of the agreement to a body count. This we decline to do, but instead echo our earlier observation that when

considering the single versus multiple conspiracy conundrum, "[w]hether one uses similes of wheels, hubs, or spokes, the result should be the same. A mere shuffling of personnel in an otherwise on-going operation with an apparent continuity will not, alone, suffice to create multiple conspiracies." United States v. Nichols, 741 F.2d 767, 772 (5th Cir.), cert. denied, 469 U.S. 100 (1985).

As to the third factor, the similarities in the statutory offenses are obvious. In addition to alleging violations of the identical statutes, the overt acts charged are markedly similar, if not identical. Both indictments target a single conspiracy to sell illegal tax schemes and they detail marketing seminars, the deposit of funds in the Cayman Islands, and the formation of various business entities to facilitate the activity. Finally, there are parallels in the locations of the activities, to-wit, seminars held in several United States

cities and the routing of funds through financial institutions in the Cayman Islands. We conclude that the two indictments charge separate parts on one conspiracy.

That conclusion ends our double jeopardy inquiry notwithstanding that the convictions under the Oregon indictment were vacated and remanded to the district court with instructions to review for possible breaches of United States v. Brady, 373 U.S. 83 (1963), and/or Fed.R.Crim.P. 16(a)(1)(C). The Oregon district court may order a new trial; or it may find neither a Brady nor rule violation, in which event it might decide to reinstate the convictions. Under either scenario, Bryan would have been placed in jeopardy for conspiracy by the Oregon indictment, therefore, he cannot again be placed in jeopardy for that conspiracy.

II. Venue

The next issue raised is a challenge to venue. Bryan contends that the 13 substantive

counts charged in the indictment should be dismissed for lack of proper venue, correctly recognizing that an accused has the right to be tried in the district in which the alleged crime was committed. U.S. Const. amend. VI; Fed.R.Crim.P. 18. When challenged, the government has the burden of establishing venue by a preponderance of the evidence. United States v. Parrish, 736 F.2d 152 (5th Cir. 1984). In the case at bar the government has acquitted that evidentiary burden. The challenged counts charge Bryan with knowingly and willfully aiding and assisting in the preparation of presentation of fraudulent tax returns in violation of 26 U.S.C. § 7206(2). By virtue of 18 U.S.C. § 3237(a), venue properly lies where a false statement is prepared and signed, even though received and filed elsewhere. United States v. Slutsky, 487 F.2d 832, 839 (2d Cir. 1973). The tax returns described in Counts 2, 3, 5, 6, 7, 8, 14, 21, and 25 were prepared by Tom Garner

and Associates, Inc., whose address is shown as 8035 E. R.L. Thornton Freeway, Suite 610, Dallas, Texas 75228. Similarly, the offenses charged in Counts 4, 16, 22, and 23 were begun, continued, or completed within the Northern District of Texas. Bryan is accused of providing the false documents and information which facilitated the preparation of these returns. He properly is charged with aiding and assisting in the preparation of false tax returns in the Northern District of Texas. United States v. Slutsky. Venue is proper herein.

III. Expert Testimony

The trial court excluded the tendered expert testimony of Dr. William E. Streng, which was proffered by the defendants to establish that some confusion existed relative to the tax treatment to be accorded to commodities

transactions. By this defendants would challenge the willfulness element required by 26 U.S.C. § 7206(2).

The decision to admit or exclude expert testimony is entrusted to the discretion of the trial court. Jon-T Chemicals, Inc. v. Freeport Chem. Co., 704 F.2d 1412 (5th Cir.) 1983). We find no abuse of discretion. The tax shelters devised by Bryan and promoted by Hearn, Jackson, and Malcomson were sham transactions lacking a valid business purpose. The evidence reflects that in many cases there were no actual trades, but only prearranged transactions in a non arm's-length setting guaranteeing a loss, or the simple assignment of a loss.

In certain cases uncertainty in the application of the law relative to legitimate commodities straddles might be relevant to the willfulness element of the substantive offenses. Had the jury been required to assess such an uncertainty, expert testimony might have proven

helpful. In such a setting the denial of that evidence likely would have been an abuse of discretion. But that, however, is not the situation in the case at bar.

There are significant differences between the commodities straddles used as tax deferral plans in the 1970s and the prearranged commodities shams presented in this case. In a traditional straddle one commits to either deliver or receive a specified quantity of a commodity on a future date at a price fixed by the participants. One committing to deliver pursuant to a futures contract is a seller and has a short position; one committing to receive as a buyer and has a long position. A straddle is established by simultaneously holding a long position in one delivery month and a short position in another delivery month. The key to the straddle is to liquidate to the loss-bearing position in the first tax year in which the

taxpayer needs offsets to other gains, and defer the gain-bearing position to the following tax year.

By contrast, the commodities shams devised by Bryan were prearranged transactions which permitted the taxpayer to purchase a taxable loss at no actual risk. Further, in some instances foreign corporations were used to hide the gain in the short leg of the transaction. In addition, there was evidence that, in some instances, there were no actual trades but only the creation of paperwork to document fictitious trades.

In that setting, the trial court did not abuse its discretion in declining to permit expert testimony about the legal status of legitimate straddles.

The court also properly excluded expert opinion relative to the other tax schemes, absent a showing that any of the defendants relied thereon. United States v. Daly, 756 F.2d

1076 (5th Cir.), cert. denied, 474 U.S. 1022 (1985). There is no support in the record for the proposition that any defendant relied on the advice or opinions of Dr. Streng, or of any other expert agreeing with his views, relative to the validity of deductions ostensibly generated by contributions to the Congregational Church of Human Mortality, or for payment of insurance premiums to the Professional Liability Insurance Corporation. Indeed, the record contains testimony which the jury was free to credit, reflecting that the defendants were aware when they acted that the tax schemes were illegal.

IV. Variance Between Indictment and Evidence

Two of the defendants, Hearn and Jackson, maintain that certain of their convictions must be reversed because there is a variance between the indictment and the proof offered at trial. A variance, warranting reversal, exists when the evidence establishes facts different from those

alleged in the indictment. Dunn v. United States, 442 U.W. 100 (1979). The indictment charges fraud arising from sham commodities transactions. The evidence reflected trading in treasury-bill (T-Bill) futures. Hearn and Jackson contend that T-Bills are not and cannot be said to be commodities. Although we do not necessarily disagree with that proposition, we reject it as relates to trades in T-Bill futures.

Albeit the traditional commodities futures markets involve items such as corn, wheat, soybeans, and pork bellies, in recent years the commodities futures markets have developed trading capabilities in contracts for T-Bills and foreign currency. The Commodity Futures Act of 1974, Pub.L. No. 93-463 (codified in 7 U.S.C. § § 1-24 (1982), expanded the definition of a commodity to include: " . . . all services, rights and interests in which contracts for future delivery are presently or in the future

dealt in." Courts confronting the issue have recognized that all futures contracts are regarded as commodities regardless of whether that which is deliverable to the futures contract is commonly thought of as a commodity. Messer v. E.F. Hutton, 847 F.2d 673 (11th Cir. 1988), and Conroy v. Andeck Resources, 137 Ill.App.3d 375, 484 N.E.2d 525 (1985). Futures contracts to buy T-Bills are thus the same as futures contracts to buy wool.

Additionally, several witnesses testified that Hearn and his associates at WCM designed and sold "commodities programs" as part of the clients' tax plans. Witnesses also testified that Jackson had been involved actively in the execution of their commodities transactions. The government's proof that Hearn and Jackson promoted and sold commodities schemes involving futures contracts in T-Bills is not in variance with the indictment.

V. Worley

Upon initial consideration the argument of John Worley that he merely acted as an attorney who provided tax advice, and that he did not conspire to commit tax fraud or any other criminal offense, appeared to have merit. But that contention did not withstand a close examination of the evidence, viewed through the lens which an appellate court must use in reviewing a jury's action. We have long recognized that "it is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it." United States v. Williams, 809 F.2d 1072, 1094 (5th Cir.), cert. denied, 484 U.S. 896 (1987), (quoting Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942)). Measuring the

prosecutor's evidence against this backdrop, we conclude that the record supports Worley's conviction.

Worley's participation went beyond the mere rendering of tax advice. Witnesses testified that he spoke at Balliett seminars to generate clients for WCM and that he attended licensee seminars at which the tax schemes were discussed. One witness attested to a seminar in the Cayman Islands, attended by Worley, where it was disclosed that the commodities transactions would involve the assignment of losses to the taxpayer and the gains to a foreign company so as to generate a taxable loss on paper. Hearn and a WCM employee testified that they had explained to Worley the operation of the foreign corporations and that they had discussed various methods to secretly return offshore gains to a client. Worley participated in the decision to create an offshore corporation for the clients and discussed how to avoid discovery or tracing

through postal cancellation markings. It was not necessary that Worley sign or actually prepare a tax return in order to be guilty of willfully aiding and assisting in the preparation of false returns. United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978). It is well settled that 26 U.S.C. § 7206(2) does not apply solely to tax return preparers. From the evidence adduced the jury reasonably could infer that Worley willfully aided and assisted in the preparation of a false return.

VI. Jackson

Jackson maintains that there was insufficient evidence to support his conviction of conspiracy and of the substantive counts. The record does not support his contention. Testimony reflected that Jackson was more than a mere bystander to the commodities transactions. He traveled to the Cayman Islands to meet Bryan. He spoke at USTPS client seminars. In addition, he lectured at licensee

seminars about commodities futures markets, and referred clients for tax planning services. One WCM employee testified that Jackson knew and understood all aspects of the commodities transactions. Clients sent their funds for the commodities programs directly to Jackson. Moreover, one client personally delivered $55,000 to Jackson. The record contains sufficient evidence to support the verdicts as to Jackson.

Finally, Jackson maintains that his trial should have been severed because he was only involved in the commodities transactions and, accordingly, he was prejudiced by evidence of other violations.

We begin by reminding of the general rule that persons indicted together are to be tried together. United States v. Harrelson, 754 F.2d 1153, 1174 (5th Cir.), cert. denied, 474 U.S. 922 (1985). District courts have the discretion to order a severance "[i]f it appears that a

defendant or the government is prejudiced by a joinder of offenses or of defendants. . . ." Fed.R.Crim.P. 14. Absent an abuse of discretion, the decision of the district court will not be disturbed.

To demonstrate an abuse of discretion by the district court Jackson must establish "that he was unable to obtain a fair trial without severance and that he suffered compelling prejudice which the trial court could not prevent." United States v. Wilson, 657 F.2d 755, 765 (5th Cir. 1982), cert. denied, 455 U.S. 951 (1982). We conclude that Jackson has not met this burden. By carefully worded jury instructions the district court effectively neutralized the possibility of prejudicial effect resulting from spillover evidence. Further, the district court took pains to aid the jury in distinguishing between the defendants. The potential for prejudice was

averted by the trial court's meticulous management of this complex and lengthy proceeding.

The convictions are AFFIRMED. Bryan's motion to dismiss the conspiracy charge on grounds of double jeopardy should have been granted and the matter is REMANDED for entry of an appropriate order of dismissal as to that count.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-1327

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES G. BRYAN, JAMES A. HEARN,
EUGENE R. JACKSON, JOHN WORLEY,
AND JULIAN MALCOMSON,

Defendants-Appellants.

PETITION FOR REHEARING OF
APPELLANT JULIAN MALCOMSON

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, Julian Malcomson, one of the above-named Appellants, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in

the above-entitled cause. In support of this petition, Appellant represents to the Court as follows:

I.

The Court rendered a decision in this cause on February 22, 1990. However, such decision fails to address a point of law raised in the Brief of Appellant Julian Malcomson; more particularly, that Appellant was denied effective assistance of counsel. (See Brief of Appellant Julian Malcomson, at Pages 5 - 10). The Court's decision thereby overlooks a point of law that is unique to Appellant's case. A rehearing is requested so that the Court's decision will adequately address all points of law raised by Appellant Julian Malcomson on appeal.

II.

The point of law which has been overlooked by the Court in its decision can be summarized as follows: Appellant was found to be indigent

and was living in California at the time he was indicted in Dallas. His Court appointed counsel for trial was Mr. Cornell Walker, an attorney in Dallas, Texas. Malcomson filed a Motion for Costs on August 20, 1987, to order the government to reimburse him for travel expenses to Dallas so that he might consult with his court appointed counsel in person and contemporaneously therewith review the great mass of documents which were to be presented by the government at the trial of this matter. The Trial Court denied Malcomson's Motion for Costs stating that Malcomson could "effectively communicate with his attorney through telecommunication or through the United States Postal Service". As a result of the Court's ruling, Malcomson was denied effective assistance of counsel as he was effectively barred by the Trial Court from properly investigating and preparing his case for trial with his attorney.

WHEREFORE, Appellant Julian Malcomson prays that a rehearing be granted and that on rehearing granted, this Court's decision dated February 22, 1990, be withdrawn and the Court enter a new decision dismissing the indictment against Appellant and overturning his criminal conviction, or alternatively granting Appellant a new trial.

DATED: March 6, 1990.

Respectfully submitted,

/S/

RONALD O. HOLMAN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief for Appellant was served upon all counsel of record this ____ day of March, 1990, by U. S. Mail.

/s/

RONALD O. HOLMAN

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 88-1327

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES G. BRYAN, JAMES A. HEARN,
EUGENE R. JACKSON, JOHN WORLEY,
and JULIAN MALCOMSON,

Defendants-Appellants.

Appeals from the United States
District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(March 26, 1990)

Before GOLDBERG, POLITZ and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing as to Julian Malcomson ONLY, filed in

the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

(9006181w.d5)